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No. 09-1343

IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY, LTD.,
Petitioner,

v.

ROBERT NICASTRO, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the nation's business community.

Like the companion case, *Goodyear Luxembourg Tires, S.A. v. Brown* (No. 10-76), the decision below in this case raises just such vital concerns for the nation's business community. While some of the Chamber's interests in the two cases overlap, this case raises distinct issues warranting this separate brief. Specifically, unlike *Goodyear*, this case concerns claims *related to* defendant's act of allegedly placing the goods in the stream of commerce. That issue occupied the Chamber's members long before this Court's decision in *Asahi*, and the splintered opinions in that case only have compounded the difficulties, as Petitioner pointed out in its petition for a writ of *certiorari*. Resolving this question left unsettled by *Asahi* will provide American business essential guidance about the jurisdictional consequences of their decisions regarding how to organize their affairs and to sell their products. The Chamber is uniquely positioned to explain the broader commercial implications of the possible approaches to this issue.

SUMMARY OF THE ARGUMENT

This Court should adopt the additional conduct test announced by the plurality opinion in *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987). Under that test, the mere act of placing a good in the stream of commerce where the defendant knows (or

can foresee) that it might reach the forum state does not satisfy the constitutional standard for personal jurisdiction over a non-resident defendant. Instead, the plaintiff must identify "additional conduct" showing that the defendant purposefully directed its activities at the forum state. Because the lower court failed to apply that test, its judgment should be reversed. In addition to the reasons given in Petitioner's brief, this brief offers four novel arguments.

First, the additional conduct test best comports with three bedrock principles that underlie the Due Process limits on state court assertions of judicial jurisdiction. Those three bedrock principles include (A) the defendant's own contacts (and not the contacts of some other party) are the only relevant ones in the constitutional analysis; (B) the defendant's contacts with the forum state (and not some other jurisdiction) are the only ones that matter; and (C) the contacts must constitute "purposeful availment." The additional conduct test respects each of those principles. By contrast, the test applied by the lower court, which drew heavily on Justice Brennan's separate opinion in *Asahi*, does not. Both the lower court's test and Justice Brennan's test impute third-party contacts to the defendant, sweep in the defendant's contacts with jurisdictions other than the forum state and dilute the "purposeful availment" requirement.

Second, a more relaxed stream-of-commerce test such as that adopted by the court below—especially its requirement that the nonresident defendant prove it sought to prevent entry of the goods into the forum state—has deleterious consequences for the American economy and American business. That requirement cripples interstate and foreign commerce, much like a

state statute designed to undermine the flow of goods into the state. It also has an especially harsh effect on small businesses who supply component parts to large-scale manufacturers. Those small businesses cannot control where downstream companies will ultimately sell the finished goods containing their parts; the lower court's rule forces them to choose between risking suit in a faraway forum and cutting off an important commercial relationship. Finally, the decision below will bog down companies and courts in expensive and time-consuming jurisdictional discovery. As the seven-plus year history of this case perfectly illustrates, complex jurisdictional tests invite such one-sided discovery which is then used to pile costs on the non-resident defendant and to tie up the judicial system in collateral litigation.

Third, to the extent the Court is concerned about the results of a rule that would leave resident plaintiffs without a United States forum in which to sue foreign defendants, Congress might authorize federal courts to exercise personal jurisdiction based on the defendant's nationwide contacts. Such an approach, which the *Asahi* plurality identified, harnesses the differences between the Fifth Amendment's constraints on federal courts and the Fourteenth Amendment's constraints on state courts. Relying on these differences, numerous lower federal courts have upheld the exercise of personal jurisdiction under Federal Rules of Civil Procedure 4(k)(1)(d) and 4(k)(2) based on a foreign defendant's contacts with the United States as a whole. In recent years, Congress has considered legislation to address a possible gap in judicial jurisdiction over foreign manufacturers. Rather than dilute the constitutional constraints on state assertions of judicial jurisdiction, this Court should allow that legislative process to run its course.

Fourth, amicus urges this Court to use this case to expound upon the meaning of several components of the additional conduct test. The additional conduct test includes "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." It would benefit the business community if this Court eliminated any misunderstanding about the meaning of this phrase. A "distributor" and an "agent" are two very different legal entities and have distinct legal relationships with a product manufacturer. Whereas a distributor is an independent company in an arms-length relationship with a product manufacturer, an agent often is not. Thus, it would be inappropriate to equate these two distinct business relationships in the jurisdictional inquiry. Furthermore, the "additional conduct" test also includes "advertising in the forum State." Again, it would benefit the business community if this Court made clear that a company's mere presence on an internet webpage that was accessible in the forum state did not constitute "advertising in the forum state." At the time the *Asahi* plurality used that term, the internet had not come of age in the commercial marketplace. In the intervening decades, the internet has assumed great importance as a marketing vehicle, especially for small businesses that require a cost-effective medium to reach a broad customer base. Some courts have stretched this language from the *Asahi* plurality opinion to find personal jurisdiction over a company by virtue of its maintenance of a website accessible in the forum state. While this case does not require the Court definitively to resolve the matter, it is an appropriate vehicle to correct that distortion of the "additional conduct" test.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT PERMIT STATE COURTS TO ASSERT JUDICIAL JURISDICTION BASED SOLELY ON A DEFENDANT'S ACT OF PLACING GOODS IN THE STREAM OF COMMERCE, EVEN WHEN THEIR ENTRY INTO THE STATE IS FORESEEABLE.

"The foundation of jurisdiction is physical power." *McDonald v. Mabec*, 243 U.S. 90, 91 (1917). Since the Fourteenth Amendment's adoption, this Court has repeatedly stressed that this Clause constrains state exercises of judicial power over non-resident defendants, including corporations. *See International Shoe Co. v Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). While *Pennoyer* employed a territoriality principle to define these limits on state power, *International Shoe* defined them in terms of the defendant's "contacts" with the forum state.

In this case, the lower court tellingly conceded that the Petitioner did not have "a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction . . . ." Appendix to Petition for a Writ of *Certiorari* ("Pet. App.") 14a. Instead, the Court recognized that "[Respondent's] claim that [Petitioner] may be sued in [New Jersey] must sink or swim with the stream-of-commerce theory of jurisdiction." *Id.*

This Court last confronted the stream-of-commerce theory of jurisdiction in *Asahi*. While it unanimously agreed that the Due Process Clause did not support the exercise of personal jurisdiction over Asahi, it divided on the reasoning. Four justices believed that the Due Process Clause "require[d] something more

than that the defendant was aware of its product's entry into the forum State through the stream of commerce . . . ." 480 U.S. at 111 (opinion of O'Connor, J., joined by Rehnquist, CJ and Powell and Scalia, JJ). By contrast, four other justices found that, while the exercise of personal jurisdiction was unreasonable, the Due Process Clause ordinarily would be satisfied if the defendant placed a product into the stream of commerce and was aware that the product had entered the forum state. *Id.* at 117 (Brennan, J., joined by White, Marshall and Blackmun, JJ.). Justice Stevens embraced a view, which has not been widely accepted by the lower courts, under which the constitutional test turned the "volume, the value and the hazardous character of the component." *Id.* at 122. *See generally* 4 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §1067.4 n. 14 (2010).

Amicus urges this Court to adopt the additional conduct test announced in Justice O'Connor's plurality opinion and to use this case to expound upon several of its features. Subpart A explains how that test is most consistent with three core principles underlying this Court's jurisprudence on the constitutional limits to state judicial jurisdiction. Subpart B explains the deleterious consequences that would flow from the adoption of a more relaxed test. Subpart C argues that, to the extent the Court is concerned about leaving some injured United States citizens without an American forum in which to sue a foreign company, Congress might authorize federal courts to exercise personal jurisdiction over those defendants based on their nationwide contacts. Finally, Subpart D identifies two features of the additional conduct test that are particularly important to the American business community and on which this Court should elaborate.

A. The "Additional Conduct" Test Announced by Justice O'Connor's Plurality Opinion in *Asahi* Best Advances The Core Principles Of The Constitutional Limits on State Judicial Jurisdiction.

Under this Court's specific jurisdiction decisions, the Due Process Clause typically requires a plaintiff to prove both that the defendant has minimum contacts with the forum state and that the exercise of judicial jurisdiction comports with traditional notions of fair play and substantial justice. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). This constitutional requirement applies to all assertions of judicial jurisdiction against defendants not "present" in the forum state. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *see also Burnham v. Super. Ct.*, 495 U.S. 604, 609-610 (1990) (plurality opinion). It "protects the defendant against the burdens of litigating in a distant or inconvenient forum" and "ensure[s] that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Woodson*, 444 U.S. at 292. Three features of this generally applicable constitutional standard guide the determination of the proper test for assertions of judicial jurisdiction predicated on the stream-of-commerce theory.

First, "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). This Court has repeatedly relied on this principle to guide the Due Process inquiry. In a series of cases, it has held that that contacts between third-parties and the forum state could not

be not used to establish the defendant's minimum contacts. *See, e.g., Kulko v. Super. Ct.*, 436 U.S. 84, 93-94 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Likewise, in another line of cases, this Court relied on that principle to hold that an employer's contacts could not be attributed to an employee. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984); *Calder v. Jones*, 465 U.S. 783, 790 (1984). For example, in *Rush*, the Court held that the contacts between a defendant's insurer and the forum state did not suffice to establish that "the *defendant* engaged in any purposeful activity related to the forum . . . ." 444 U.S. at 329 (emphasis in original). Similarly, *Keeton*, explained that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary." *Keeton*, 465 U.S. at 781 n. 13. *See also Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925). At bottom, then, the critical entity for purposes of minimum contacts analysis is the defendant itself.

Second, the defendant's contacts *with the forum state* are the sole contacts relevant to the jurisdictional analysis. *See Woodson*, 444 U.S. at 298-99; *Kulko*, 436 U.S. at 94-95. In *Woodson* and *Kulko*, the Court soundly rejected the notion that the constitutionally necessary contacts could be derived from contacts in another state that bore some loose connection to the forum state. For example, in *Woodson*, the plaintiffs claimed that the sales of automobiles in New York created minimum contacts with Oklahoma due to "the fact that automobiles are capable of use in distant States like Oklahoma." *Woodson*, 444 U.S. at 298. In response, *Woodson* explained that "financial

benefits accruing to the defendant from a *collateral relation* to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." *Id.* at 299 (emphasis added). At bottom, then, the critical "forum" for purposes of the minimum contacts analysis is the State asserting jurisdiction, not another state with which the defendant might have contacts.

Third, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum state." *Hanson*, 357 U.S. at 253. This requirement is "essential" in every case. *Id.* Random, fortuitous or attenuated contacts with the forum state do not satisfy the requirement. *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985). By contrast, actively seeking out and consummating in the forum state the transaction giving rise to the claim can, under some circumstances, satisfy the requirement. *See id.* at 478; *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). For example, in *Burger King*, the Court reaffirmed that the mere execution of a contract with a forum resident alone cannot "automatically establish sufficient minimum contacts in the other party's home forum." 471 U.S. at 478-79. Rather, under the "contracts plus" approach of that decision, additional indicia such as "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimum contacts. . . ." *Id.* at 479.

The additional conduct test best advances these three bedrock principles and therefore supplies the proper rule governing cases that "sink or swim with the stream-of-commerce theory of jurisdiction."

See Asahi, 480 U.S. at 112 (plurality opinion) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*") (quoting *Burger King*, 47 1 U.S. at 475; *McGee*, 335 U.S. at 223).

First, that approach more faithfully ensures that only the *defendant's* contacts guide the constitutional analysis. By requiring "additional conduct" such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," *Asahi*, 480 U.S. at 112, that approach focuses a court's attention on the defendant's *own* activity. By contrast, Justice Brennan's approach attributes the conduct of other entities to the defendant. For example, in *Asahi*, under Justice Brennan's approach, Cheng Shin's sales of the finished tire tubes to California would be attributed to Asahi even though Asahi, once it sold the tire valve assemblies to Cheng Shin, had no control over where the tire tubes ultimately would be sold. That "jurisdiction by attribution" approach flouts the principle from cases such as *Rush* and *Keeton* under which "the requirements of *International Shoe* . . . . must be met as to each defendant over whom a state court exercises jurisdiction." Such an approach "destroys the notion of individual sovereignties inherent in our federal system" and "would subject defendants to judgments in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and

risks." *Lesnick v. Hollingsowrth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). If jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly owned subsidiary, it follows logically that jurisdiction over a company with an even more remote connection to the defendant (such as a purchaser of component parts, as in *Asahi*, or a distributor) likewise cannot automatically establish jurisdiction over the non-resident company.

Second, the additional conduct test more faithfully ensures that only the defendant's contacts *with the forum* count in the constitutional analysis. Each example of the "additional conduct" identified by the plurality opinion requires some activity directed at the forum state specifically. For example, the product must be designed "for the market in the forum state" or the advertising must occur "in the forum state." By contrast, Justice Brennan's approach credits contacts with other forums. The lower court's opinion in this case illustrates the perils. All Petitioner is alleged to have done in this case is to sell a piece of equipment to its distributor. Yet because the distributor covered a nationwide market, the court seized upon this sale in Ohio to manufacture the contacts between the Petitioner and New Jersey. Pet. App. 37a. That stretching of the relevant forum flouts the principle from *Kulko* and *Woodson*. These are precisely the sort of "financial benefits accruing . . . from a *collateral relation* to the forum state" and "do not stem from a constitutionally cognizable contact with that State."

Third, the additional conduct test more faithfully ensures that the defendant's contacts with the forum state satisfy the purposeful availment requirement that is "essential in every case." *See Asahi*, 480 U.S.

at 112 ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."). That approach recognizes that the role of additional conduct is to "indicate an intent or purpose to serve the market in the forum state." 480 U.S. at 102. *See also Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989) (opinion of Judge Brown joined by Judges Breyer and Bownes) ("[I]n the so-called 'stream of commerce' cases, courts must focus on the acts of the non-resident defendant to see if the defendant has a 'substantial connection' with the forum State to support an assertion of personal jurisdiction.") (citations omitted). By contrast, Justice Brennan's approach, focusing purely on knowledge or foreseeability, fails to require the necessary indicia of an "intent or purpose to serve the market in the forum state." This relaxed approach flouts the principle from *Burger King*. If a contract with a resident of the forum state, standing alone, does not establish that the defendant "purposefully established minimum contacts," it logically follows that the delivery of a good pursuant to *another* contract with *another* party in *another* state likewise cannot, standing alone, satisfy this constitutional requirement. Additional conduct, just like "additional indicia," as *Burger King* held, is necessary.

In sum, the additional conduct test in *Asahi* most faithfully advances three principles that have unified this Court's jurisprudence regarding the constitutional limits on state court assertions of judicial jurisdiction—(1) defendant's contacts (2) with the forum state that (3) rise to the level of purposeful availment. Thus, as several lower courts have recognized, this approach "is most consistent with the Court's earlier pronouncements" and represents the

better approach to cases that depend on the stream-of-commerce theory. *CSR, Ltd. v. Taylor*, 983 A.2d 492, 507 (Md. 2009).

B. The Lower Court's Stream-of-Commerce Test Has Deleterious Consequences For American Business.

Apart from its incompatibility with bedrock principles of this Court's Due Process jurisprudence, the lower court's "entirely new and unbounded" test has deleterious consequences for the American economy and American business. Pet. App. 45a (dissenting opinion). Here, *amicus* stresses three such consequences: (1) a crippling effect on commerce, (2) damage to small businesses, especially those that produce component parts, and (3) expensive and time-consuming jurisdictional discovery

First, a more relaxed stream-of-commerce test has a crippling effect on commerce. Under the lower court's rule, a company whose products enter the stream of commerce can only avoid judicial jurisdiction of foreign forums by showing that it took affirmative steps to preclude the entry of its product into a forum state. Pet. App. 38a. That holding parallels a similar holding by the North Carolina Court of Appeals in *Goodyear Luxembourg Tires, S.A. et al. v. Brown et al.* (No. 10-76). As *amicus* explains in its brief in that case, this rule discourages both foreign and interstate commercial activity. *See* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners in *Goodyear Luxembourg Tires, S.A. et al. v. Brown et al.* (No. 10-76). In doing so, as Justice Rivera-Soto correctly recognized in dissent in this case, it "offends those core federalist concepts that rightly and prudentially limit the exercise of any one state's judicial

power via the invocation of long-arm jurisdiction." Pet. App. 72a.

Second, a more relaxed stream-of-commerce test has a particularly damaging effect on small businesses, which comprise a core constituency of *amicus'* membership. Whatever rule the Court announces will have implications not simply for cases such as this one (involving a forum state plaintiff and a foreign manufacturer) but also for purely domestic cases (such as one involving a small business located in one state and a plaintiff located in another). In this latter setting, the lower court's rule is especially troubling. For example, small businesses often supply component parts to larger manufacturers (much like the relationship between the tire valve company and the tire tube assembler in *Asahi*). *See, e.g.*, *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 84-85 (1st Cir. 1997); *Adell Corp. v. Elco Textron, Inc.*, 51 F. Supp. 2d 752 (N.D. Tex. 1999). In those relationships, the component parts manufacturer does not control where the manufacturer of finished goods markets the products and cannot insist that this manufacturer limit its sale of goods containing the component parts to certain markets. *Cf. Rush*, 444 U.S. at 329 (noting that defendant "had no control over [its insurer's] decision" to do business in forum state). Similarly, small business may try to sell their goods to a retailer with nationwide outlets. *See, e.g.*, *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Jones v. Boto Co., Ltd.*, 498 F. Supp. 2d 822 (E.D. Va. 2007); *Abel v. Montgomery Ward Co.*, 798 F. Supp. 322 (E.D. Va. 1992). As with the component parts case, small business owners have little control over the retailers' choices about where to market the goods. *See, e.g., Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 475 (5th Cir. 2006) (Demoss, J.,

specially concurring). In these sorts of cases, the lower court's rule presents the small business with an intractable dilemma—continue to sell its goods to the manufacturer or retailer (thereby risking a financially burdensome lawsuit in a faraway forum) *or* terminate the relationship entirely (thereby cutting off an important source of business and decreasing competition in the market).

Third, the lower court's test promises to bog down parties and the courts in expensive and time-consuming jurisdictional discovery. As this Court just recently observed in the context of determining a corporation's principal place of business:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake.

Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010) (citations omitted). The lower court's emphasis on a company's "knowledge" and the steps that it took (or didn't take) to preclude the flow of its products into a forum entail just the sort of complexity that the unanimous Court in *Hertz* wanted to avoid. As the New Hampshire Supreme Court concluded in its opinion adopting the additional conduct test:

> Actual knowledge, especially when dealing with a commercial setting, may be difficult to determine. It may not be obvious whose knowledge—which corporate officer's—is determinative. Also

> important evidence may be located in distant jurisdictions, and, therefore difficult to obtain.

Vermont Wholesale Bldg. Prods., Inc. v. J.W. Jones Lumber Co., Inc., 914 A.2d 818, 827 (N.H. 2006).

Plaintiffs will exploit the "difficult[ies]" of such concepts through the strategic use of jurisdictional discovery. Though this Court has not extensively addressed jurisdictional discovery (except in the context of upholding a sanction, *see Insurance Co. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694 (1982)), such tactics are an unfortunate reality in many cases where a non-resident company challenges personal jurisdiction. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash. & Lee L. Rev. 489 (2010). Just like merits discovery, jurisdictional discovery can be "expensive." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Moreover, jurisdictional discovery, unlike merits discovery, is directed entirely at the defendant, so it represents an especially powerful weapon in a plaintiff's arsenal for piling on costs and can "push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 559. Not only do these tactics compound the defendants' costs, they also expend "judicial resources." *Hertz*, 130 S. Ct. at 1193. The underlying suit in this case was filed over seven years ago and has bounced up and down the New Jersey court system over disputes about jurisdictional discovery and the proper jurisdictional test. *See* Pet. App. 3a-10a. Such a state of affairs, which the lower court's rule is bound to reproduce, serves neither the parties nor the judicial system.

C. Carefully Crafted Federal Legislation, Not an Evisceration of the Due Process Clause, Might Address Any Concerns Over Assuring The Availability Of A Forum For Resident Plaintiffs Injured By Foreign Defendants.

The court below justified the more relaxed rule on the grounds that "[t]he power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy." Pet. App. 14a. This notion that the constraints of the Due Process Clause must evolve with commerce traces to the following passage from this Court's opinion in *McGee*:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign governments and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With the increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

355 U.S. at 222-23.

While our national economy certainly has undergone a "fundamental transformation" since the Fourteenth Amendment's adoption, "it is a mistake to

assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson*, 357 U.S. at 251. "The economic interdependence of the States was foreseen by the Framers," so the increased interconnectedness does not justify a dilution of the "principles of interstate federalism embodied in the Constitution." *Woodson*, 444 U.S. at 293. Indeed, if anything, the increased interconnectedness of our economy enhances the risk of interstate or international commercial conflict and, thus, heightens the need for clear limits on state adjudicatory authority.

Those limits may, of course, result in certain cases where a citizen of the forum state is injured in the forum state by an overseas manufacturer's product and yet not have an American forum in which to sue the manufacturer. (Such a risk, of course, does not exist with respect to domestic manufacturers which historically have been amenable to suit in the state of their incorporation. *See, e.g., St. Clair v. Cox*, 106 U.S. 350, 353 (1882).) Yet the solution to this "gap" in judicial jurisdiction over foreign manufacturers is not to rewrite the "restrictions on the personal jurisdiction of state courts." Instead, the proper remedy is for Congress to fill the gap through the adoption of federal legislation, as it has done in other contexts. *See Omni Capital Int'l Ltd. v. Rudolf Wolff Co. Ltd.*, 484 U.S. 97, 105 (1987).

Specifically, the solution to this above-described "gap" is for Congress to "authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts . . ." *Asahi*, 480 U.S. at 113 n.* (plurality opinion). (Subject-matter jurisdiction in such cases already exists pursuant to the alienage provisions of the federal diversity statute.

See 28 U.S.C. §1332(a)(2)-(3); U.S. Const. Art. III, §2.) On several occasions, Congress has authorized federal courts to exercise personal jurisdiction over foreign defendants on the basis of their nationwide contacts. *See* Fed. R. Civ. P. 4(k)(1))(d), 4(k)(2). For example, Federal Rule of Civil Procedure 4(k)(2) authorizes federal courts to exercise personal jurisdiction in federal question cases "over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."

This solution rests on critical differences between the constitutional limits on the assertion of judicial jurisdiction in the Fourteenth Amendment and those in the Fifth Amendment. The Fourteenth Amendment sets the constitutional boundaries for assertions of jurisdiction by state courts. In those cases, the "forum" for purposes of the Due Process Clause, as noted above, is the individual state. By contrast, the Fifth Amendment sets the constitutional boundaries for assertions of jurisdiction by United States Courts. In those cases, the "forum" for purposes of the Due Process Clause is the United States as a whole. In recognition of this difference, numerous federal courts have upheld assertions of personal jurisdiction based on a foreign defendant's nationwide contacts in cases where a federal statute or federal rule has explicitly authorized such an assertion of jurisdiction. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* 194-95, 199-200, 215-16 (Aspen 2006).

In recent years, Congress has considered various proposals to address this gap in judicial jurisdiction over foreign companies, *see, e.g.,* S.1606, *The Foreign Manufacturers Liability Act of 2009*, though *amicus* has not endorsed any specific proposal. Conceivably,

Congress might authorize *federal courts* (though not state courts) to exercise personal jurisdiction over foreign companies on the basis of their nationwide contacts. *See* Testimony of Victor E. Schwartz on behalf of the U.S. Chamber of Commerce, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, Hearing on "Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable," 111th Cong., 1st sess. (May 19, 2009). To limit the law's sweep, Congress might confine this authorization to instances in which the defendant "is not subject to jurisdiction in any state's courts of general jurisdiction" as it did with Rule 4(k)(2). Any option, of course, requires Congress to balance competing considerations ultimately affecting the nation's foreign economic policy, and it certainly is not necessary for this Court to provide Congress a blueprint on how to strike that balance, just as it declined to do so in *Omni Capital*. · Nor would it be appropriate for this Court to offer an "advisory opinion" on the constitutionality of a particular approach. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). Rather, this Court could invite Congress to fill the gap and, then, reserve judgment on the ultimate constitutional question.

At bottom, then, any concerns about a resident plaintiff lacking a forum for a suit against a foreign company do not justify watering down important constitutional restrictions on the assertion of state judicial jurisdiction, restrictions that protect foreign and domestic companies. Rather, as is often the case, Congress has before it an alternative path—and the Court should allow the legislative process to run its course.

D. The Court Should Use This Case To Explicate Two Features Of The "Additional Conduct" Test.

While *amicus* endorses the additional conduct test, it respectfully urges this Court to use this case as an opportunity to elaborate on two aspects that are especially important to the business community.

1. The Court should eliminate any confusion over the differences between agency and distributor relationships.

First, the Court should make clear that not all networks for the distribution of a company's product satisfy the "additional conduct" requirement. In *Asahi*, the plurality described the relevant additional conduct to include "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state." 480 U.S. at 112. *Amicus* respectfully submits that this quoted language could be read to collapse the difference between "distributors" and "agents."

Agency relationships and distribution relationships represent radically different business models. *See* Ralph H. Folsom *et al.*, *International Business Transactions* 127-54 (West 2d ed. 2001). In a simple agency relationship, the company retains the services of one or more individuals (or companies) which are responsible for generating sales of products within a particular region. Agents often work on commission and never take title to the goods. Rather, they arrange direct sales between the company and the ultimate customer. Both risk and title pass directly from the seller to the customer.

Distribution arrangements stand on a very different footing. In a simple distribution relationship, the seller enters into an arms-length contractual relationship with the distributor. The distribution relationship typically covers a defined geographic area and may be exclusive or non-exclusive. The authorized distribution may carry the products of several companies. Unlike agents, distributors do not work on commission but, instead, purchase the products outright from the seller and then sell those products onto the customer. In contrast to an agency relationship, title and risk typically pass from the seller *to the distributor*. When the distributor sells the product to a customer, it is the distributor who passes title and risk to that customer.

These differences can bear on the "additional conduct" analysis. Where the company employs sales agents within the forum state, it is likelier that the company has purposefully directed its actions toward the forum state. That was the central lesson from *International Shoe* where the company employed sales agents who worked directly in the State of Washington and arranged sales between Washington customers and the non-resident corporation. 326 U.S. at 313. By contrast, as the dissenting judges in the opinion below recognized, where the company enters into an arms-length distribution arrangement, the seller has not directed its actions toward all the states within the distributor's network. Pet. App. 60a-62a. That was a central lesson from *Woodson* where the manufacturer (Audi), the importer (Volkswagen of America), the regional distributor (World-Wide) and the retail dealer (Seaway) stood in an arms-length relationship. Although the manufacturer in *Woodson* did not challenge personal jurisdiction, the Court made clear that each entity would be subject to a

separate jurisdictional analysis. *See* 444 U.S. at 297-98 (explaining how if the "manufacturer *or* distributor" targets the forum state it is not "unreasonable to subject *it* to suit" in that state for defective merchandise causing injury there) (emphasis added). To hold otherwise would impute the distributor's conduct to the seller and run contrary to this Court's instruction that "[e]ach defendant's contacts with the forum State must be assessed individually." *Keeton*, 465 U.S. at 781 n. 13.

While it may be objected that this distinction provides companies a roadmap for how to structure their operations in order to avoid judicial jurisdiction, that complaint is both inaccurate and ignores one of the central purposes of the Due Process constraints on state courts' exercise of judicial jurisdiction. The complaint is inaccurate because a plaintiff wishing to sue the upstream manufacturer may have remedies in other forums. Moreover, a central purpose of the Due Process Clause is to provide potential defendants some predictability about the conduct that will subject them to jurisdiction and, thereby, allow them to structure their primary conduct. *Woodson*, 444 U.S. at 297. Making clear that not all networks for the distribution of a company's product satisfy the "additional conduct" requirement provides some essential predictability.

2. The Court should reduce uncertainty over whether internet advertising constitutes "advertising in the forum state."

Second, the Court should make clear that certain forms of internet advertising do not satisfy the "additional conduct" requirement. In *Asahi*, the plurality described the relevant additional conduct to

include "advertising in the forum state." 480 U.S. at 112. Apart from requiring that the advertising occur "in the forum state," *Asahi* did not illuminate the forms of advertising that would suffice, but obviously in 1987 the use of the internet for commercial purposes practically did not exist.

In the intervening twenty-three years, the internet has "experienced extraordinary growth" and become an important advertising medium. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997). Its use affects every sector of the economy and businesses of all sizes. It is especially important to small businesses, a core component of the Chamber's membership, by providing an especially cost-effective means (compared with traditional media) to communicate with a wide array of customers.

The increased use of this advertising medium has spawned a litany of decisions that attempt to map general principles of personal jurisdiction onto this revolutionary technology *See generally* Richard E. Kaye, *Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction Under Long-Arm Statutes and Due Process Clause,* 81 A.L.R.5th 41 (2010) (collecting cases). Some courts have held that a defendant who maintains a webpage is subject to personal jurisdiction in any state where that web page may be accessed. *Id.* This position threatens to obliterate any meaningful constitutional limits on personal jurisdiction for businesses that rely on the internet. By contrast, other courts sensibly have required something more than a mere presence on the internet in order to find that the defendant has "advertis[ed] in the forum state." *Id.*

This case obviously does not involve internet advertising and therefore does not require the Court

to decide definitively what array of Internet activities satisfy the "purposeful availment" requirement of the Due Process Clause. Nonetheless, assuming that this Court adopts some form of the "additional conduct" test, the case does provide an appropriate vehicle to gloss the meaning of "advertising in the forum state" in light of the rapid technological changes that have occurred over the last decades. Specifically, in order to provide a "degree of predictability" to companies, the Court should make clear that, at a minimum, the mere presence on the internet does not constitute "advertising in the forum state." Otherwise, the website will become the company's "agent for service of process" and would make the company "amenab[le] to suit" wherever the website could be accessed, thereby obliterating any limits on judicial jurisdiction. *Woodson*, 444 U.S. at 296.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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